

1 FENNEMORE CRAIG, P.C.
2 David W. Dachelet (No. 6615)
3 300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: 702.692.8000
Facsimile: 702.692.8099
Email: ddachelet@fclaw.com

5 Attorneys for Plaintiff/Counterdefendant
KEYBANK NATIONAL ASSOCIATION

6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 KEYBANK NATIONAL ASSOCIATION,

Case No.: 2:10-cv-00352-PMP-LRL

9 Plaintiff,

10 vs.

11 FRANK NIELSEN, an individual; ROBERT H.
12 SCHULMAN, an individual; LAWRENCE J.
WINNERMAN, an individual; SANFORD B.
13 WINNERMAN, an individual; and WW
CENTENNIAL HILLS, LLC, a Delaware
14 limited liability company,

**MOTION TO
SUBSTITUTE PARTY**

15 Defendant.

16 AND ALL RELATED CLAIMS.

17 Plaintiff/Counterdefendant KEYBANK NATIONAL ASSOCIATION (hereinafter the
18 "Plaintiff" or "KeyBank") by and through its undersigned counsel of record, David W. Dachelet,
19 Esq. of the law office of Fennemore Craig, P.C., hereby files its Motion for Substitution of Party.

20 This Motion is made and based upon Fed. R. Civ. P. 25(a), the Memorandum of Points
21 and Authorities which follows, the papers and pleadings on file herein, and any oral argument this
22 Court should choose to entertain.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I.**

26 **STATEMENT OF FACTS**

27 On or about March 15, 2010, KeyBank commenced the instant action alleging its claims

1 for the individual defendants¹ for breach of guaranty or, in the alternative, unjust enrichment. See
 2 Complaint (#1). Shortly thereafter, the real property securing the loan the individual defendants
 3 guaranteed was sold and, therefore, KeyBank amended its complaint to add the borrower, WW
 4 Centennial Hills, LLC,² as a defendant and reformulate this case to one seeking a deficiency. See
 5 Amended Complaint (#6). The Defendants filed their own Counterclaim against KeyBank. See
 6 Answer to Complaint and Counterclaim (#10).

7 Upon information and belief, Defendant Frank Nielsen (“Nielsen”) passed away on
 8 November 22, 2010 in Clark County, Nevada. On February 9, 2011, Nielsen’s counsel filed a
 9 Suggestion of Death Upon the Record pursuant to Fed. R. Civ. P. 25(a)(2) (the “Suggestion of
 10 Death”). See Suggestion of Death Upon the record (#20), a copy of which is attached hereto as
 11 **Exhibit 1.** The Suggestion of death does not identify Nielsen’s legal representative but does state
 12 that the parties suggesting his death were Lawrence J. Winnerman, Sanford B. Winnerman, and
 13 WW Centennial Hills, LLC. *Id.* No other information is contained in the Suggestion of Death.

14 Accordingly, on March 15, 2011, the undersigned sent counsel for the Winnermans and
 15 WW Centennial Hills, LLC correspondence requesting that Nielsen’s legal representative be
 16 identified. A copy of the March 15, 2011 letter is attached hereto as **Exhibit 2.** Despite the
 17 undersigned’s request, no additional information has been provided regarding who Nielsen’s
 18 successor or legal representative is. Nevertheless, after a review of available court records, it
 19 appears that a Petition to appoint an executrix for Nielsen’s estate and for general administration
 20 of Nielsen’s will has been filed in the Clark County Probate Court. See Register of Actions
 21 attached hereto as **Exhibit 3.** As of this writing, it appears that no estate representative has been
 22 appointed. *Id.* In order to facilitate the administration of the instant action, KeyBank requests
 23 that this Court substitute the Executrix of Nielsen’s estate in place of the decedent Nielsen.

24 **II.**

25 **LEGAL ARGUMENT**

26 Where the death of a party has occurred, the substitution of parties is governed by the

27 ¹ That is, Frank Nielsen, Robert H. Schulman, Lawrence J. Winnerman, and Sanford B.
 Winnerman.

28 ² Collectively with the individual defendants referred to as the “Defendants.”

provisions of Fed. R. Civ. P. 25. That rule states, in relevant parts, as follows:

If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1). To restate, Fed. R. Civ. P. 25(a) itself provides for the substitution of Mr. Nielsen's legal representative in his place. The 90-day time period for filing a motion to substitute a decedent's successor or representative does not begin until a formal suggestion of death is *served*. *Id.*; see also *Anderson v. Auroteck*, 774 F.2d 927, 931 (9th Cir. 1985); *Acri v. Int'l Ass'n of Mach. & Aerospace Workers*, 595 F. Supp. 326, 330 (N.D. Cal. 1983).

The Suggestion of Death was filed and served on February 9, 2011. Exhibit 1. Nielsen's estate was not opened for probate until very recently on March 23, 2011. Exhibit 3. Although Nielsen's representative has not yet been appointed, it appears that one will be appointed shortly. *Id.* Accordingly, in order to comply with Fed. R. Civ. P. 25(a)'s requirements, KeyBank has filed the instant motion and requests that the executrix of Nielsen's estate be appointed in place of Nielsen in this matter pursuant to Fed. R. Civ. P. 25(a).

III.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Substitution of Party should be granted.

DATED this 25 day of April, 2011.

FENNEMORE CRAIG, P.C.

By:


David W. Dachelet (No. 6615)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

Attorneys for Plaintiff/Counterdefendant
KEYBANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

On April 25, 2011, I served the following document(s):

MOTION TO SUBSTITUTE PARTY

I served the above-named document(s) by the following means to the persons as listed below:

By ECF System (or the “Notice of Electronic Filing” to all addressees):

[] By U.S. Mail, postage fully prepared to persons and addresses as follows:

William R. Urga, Esq.
Mindy C. Fisher, Esq.
Jolley Urga Wirth Woodbury & Standish
3800 Howard Hughes Pkwy., 16th Fl.
Las Vegas, NV 89169-0925
Attorneys for Defendants/Counterclaimants
Lawrence J. Winnerman, Sanford B.
Winnerman, and WW Centennial Hills, LLC

Michael J. Oakes, Esq.
Foley & Oakes, P.C.
850 E. Bonneville Ave.
Las Vegas, NV 89101-7031
Attorneys for Defendant/Counterclaimant
Robert H. Schulman

[] **By Personal Service** (to persons and addresses):

[] For a party represented by an attorney, delivery was made by handing the document(s) to the attorney or by leaving the document(s) at the attorney's office with a clerk or other person in charge, or if no one is in charge by leaving the document(s) in a conspicuous place in the office.

[] For a party, delivery was made by handing the document(s) to the party or by leaving the document(s) at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

[] **By Direct Email** (as opposed to through the ECF system (list persons and email addresses). Based upon the written agreement of the parties to accept service by email or a court order, I caused the document(s) to be sent to the persons at the email addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[] **By Facsimile Transmission:** (list persons and fax numbers): Based upon the written agreement of the parties to accept service by fax transmission or a court order, I faxed the document(s) to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

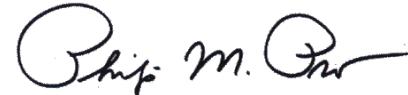
1 [] **By Messenger:** I served the document(s) by placing them in an envelope or
2 package addressed to the persons at the addresses listed below and providing them to a messenger
service. (A declaration by the messenger must be attached to this Certificate of Service).

3 I declare under penalty of perjury that the foregoing is true and correct.

4 DATED this 25th day of April, 2011.

5 /s/ Shirley May Martir-Ligot
6 An Employee of Fennemore Craig, P.C.
7
8

9 IT IS SO ORDERED.

10 
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12 PHILIP M. PRO
13 UNITED STATES DISTRICT JUDGE
14

15 Dated: May 13, 2011.
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Exhibit “1”

Exhibit “1”

1 WILLIAM R. URGA, ESQ.
2 Nevada Bar No. 1195
3 MINDY C. FISHER, ESQ.
4 Nevada Bar No. 11121
5 JOLLEY URGA WIRTH WOODBURY & STANDISH
6 3800 Howard Hughes Parkway
7 Wells Fargo Tower, Sixteenth Floor
8 Las Vegas, Nevada 89169
9 Telephone: (702) 699-7500
10 Facsimile: (702) 699-7500
11 Email: FedCt@juww.com
12 Email: mcf@juww.com

13 Attorneys for Defendants

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 KEYBANK NATIONAL ASSOCIATION, }
17 Plaintiff, }
18 vs.
19 FRANK NIELSEN, an individual; }
20 ROBERT H. SCHULMAN, an individual; }
21 LAWRENCE J. WINNERMAN, an }
22 individual; SANFORD B. WINNERMAN, }
23 an individual; and WW CENTENNIAL }
24 HILLS, LLC, a Delaware limited liability }
25 company,
26 Defendants.

27 CASE NO.: 2:10-cv-00352-PMP-LRL

28 AND RELATED CLAIMS

29 **SUGGESTION OF DEATH UPON THE RECORD**

30 Defendants Lawrence J. Winnerman, Sanford B. Winnerman, and WW Centennial Hills,
31 LLC, by and through their attorneys, Jolley, Urga, Wirth & Woodbury, suggests upon the record,

32 ///

33 ///

34 ///

1 pursuant to FRCP 25(a)(1), the death of Defendant Frank Nielsen during the pendency of this
2 action.

3 DATED this 9th day of February, 2011.

4 JOLLEY URGA WIRTH WOODBURY &
5 STANDISH

6
7 By: /s/ Mindy C. Fisher, Esq.
8 WILLIAM R. URGA, ESQ.
9 Nevada Bar No. 1195
10 MINDY C. FISHER, ESQ.
11 Nevada Bar No. 11121
12 3800 Howard Hughes Parkway, 16th Floor
13 Las Vegas, Nevada 89169
14 Telephone: (702) 699-7500
15 Facsimile: (702) 699-7555
16 Email: FedCt@juww.com
17 Email: mcf@juww.com

18 Attorneys for Defendants

19
20 **CERTIFICATE OF SERVICE**

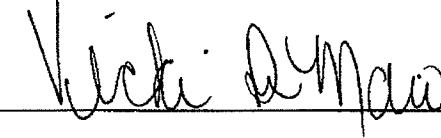
21 This will hereby certify that I am employed in the County of Clark, State of Nevada, am
22 over the age of 18 years and not a party to this action. My business address is that of Jolley Urga
23 Wirth Woodbury & Standish, 3800 Howard Hughes Parkway, Suite 1600, Las Vegas, Nevada
24 89169.

25 This is to certify that on February 9, 2011, I electronically filed **SUGGESTION OF**
26 **DEATH UPON THE RECORD** with the Clerk of Court using the CM/ECF system, which will
27 cause the document to be served upon the following counsel of record:

28 David W. Dachelet, Esq.
Fennemore Craig, P.C.
300 S. 4th Street, 14th Floor
Las Vegas, Nevada 89101
E-mail: ddachelet@fclaw.com

Attorneys for Plaintiff

1 I certify under penalty of perjury that the foregoing is true and correct, and that this
2 Certificate of Service was executed by me on February 9, 2011 at Las Vegas, Nevada.

3 
4

5 An Employee of JOLLEY URGA WIRTH
6 WOODBURY & STANDISH
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JOLLEY URGA WIRTH WOODBURY & STANDISH
3800 Howard Hughes Parkway, Suite 1600, Las Vegas, NV 89169
Telephone: (702) 699-7500 Fax: (702) 699-7555

Exhibit “2”

Exhibit “2”

FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 692-8000

David W. Dachelet
Direct Phone: (702) 692-8033
Direct Fax: (702) 692-8099
ddachelet@fcclaw.com

Law Offices
Phoenix (602) 916-5000
Tucson (520) 879-6800
Nogales (520) 281-3480
Las Vegas (702) 692-8000
Denver (303) 291-3200

March 15, 2011

VIA FACSIMILE AND U.S. MAIL

William R. Urga, Esq.
Mindy C. Fisher, Esq.
Jolley Urga Wirth Woodbury & Standish
3800 Howard Hughes Parkway
Wells Fargo Tower, Sixteenth Floor
Las Vegas, Nevada 89169

Re: *KeyBank National Association v. Frank Nielsen, et al.*
Case No. 2:01-cv-00352-PMP-LRL
File No.: 15580.049

Dear Mr. Urga and Ms. Fisher:

As you know, on February 9, 2011, your office filed a Suggestion of Death Upon the Record noting Frank Nielsen's recent passing. Pursuant to Fed. R. Civ. P. 25(a)(1), a motion to substitute the proper party must be made within ninety (90) days or by May 10, 2011. As of this letter, it does not appear that a probate estate has been opened and the Suggestion of Death does not indicate the party to substitute in for Mr. Nielsen. Accordingly, please advise me of the party to be substituted in place of Mr. Nielsen in this case so that I may prepare the appropriate motion.

Given that some time has already passed since the filing of the Suggestion of Death, I would appreciate a response by March 18, 2011. I appreciate your prompt attention to this matter and look forward to hearing from you.

Sincerely,

FENNEMORE CRAIG, P.C.



David W. Dachelet

DDAC/alb

cc: J. Michael Oakes, Esq. (via facsimile and U.S. Mail)

TRANSMISSION VERIFICATION REPORT

TIME : 03/15/2011 13:37
NAME : FENNEMORE CRAIG
FAX : 7026928099
TEL :
SER. # : BROL7J730939

DATE, TIME	03/15 13:36
FAX NO./NAME	6997555
DURATION	00:00:36
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

FAX

FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza, 300 South Fourth Street
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

Date:	March 15, 2011	From:	David W. Dachelet, Esq.
To:	William R. Urga, Esq. Mindy C. Fisher, Esq.	Fax No.:	(702) 692-8099
Firm:	Jolley Urga Wirth Woodbury & Standish	Bus. No.:	(702) 692-8033
Fax No.:	(702) 699-7555	Pages (including cover):	2
Bus. No.:	(702) 699-7500		

Please telephone (702) 692-8033 if all pages are not received.

Re: KeyBank National Association vs. Frank Nielsen, et al.
USDC, Case No. 2:09-cv-00352-PMP-LRL
Our File No. 15580.049

Comments:

Please see attached.

FAX

FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza, 300 South Fourth Street
Las Vegas, Nevada 89101

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Date:	March 15, 2011	From:	David W. Dachelet, Esq.
To:	William R. Urga, Esq. Mindy C. Fisher, Esq.	Fax No.:	(702) 692-8099
Firm:	Jolley Urga Wirth Woodbury & Standish	Bus. No.:	(702) 692-8033
Fax No.:	(702) 699-7555	Pages (including cover):	<u>2</u>
Bus. No.:	(702) 699-7500		

Please telephone (702) 692-8033 if all pages are not received.

**Re: KeyBank National Association vs. Frank Nielsen, et al.
USDC, Case No. 2:09-cv-00352-PMP-LRL
Our File No. 15580.049**

Comments:

Please see attached.

Law Offices:

Phoenix
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012

Tucson
One South Church Avenue
Suite 1000
Tucson, AZ 85701

Nogales
420 West Mariposa Road
Suite 200
Nogales, AZ 85621

Las Vegas
Suite 1400 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

Denver
1700 Lincoln Street
Suite 2900
Denver, Colorado 80203

TRANSMISSION VERIFICATION REPORT

TIME : 03/15/2011 13:38
NAME : FENNEMORE CRAIG
FAX : 7026928099
TEL :
SER. # : BROL7J730939

DATE, TIME	03/15 13:37
FAX NO./NAME	3842128
DURATION	00:00:20
PAGE(S)	02
RESULT	OK
MODE	STANDARD ECM

FAX

FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza, 300 South Fourth Street
Las Vegas, Nevada 89101

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Date:	March 15, 2011	From:	David W. Dachelet, Esq.
To:	Michael J. Oakes, Esq.	Fax No.:	(702) 692-8099
Firm:	Foley & Oakes, P.C.	Bus. No.:	(702) 692-8033
Fax No.:	(702) 384-2128	Pages (including cover):	2
Bus. No.:	(702) 384-2070		

Please telephone (702) 692-8033 if all pages are not received.

*Re: KeyBank National Association vs. Frank Nielsen, et al.
USDC, Case No. 2:09-cv-00352-PMP-LRL
Our File No. 15580.049*

Comments:

Please see attached.

FAX

FENNEMORE CRAIG, P.C.

Suite 1400 Bank of America Plaza, 300 South Fourth Street
Las Vegas, Nevada 89101

The pages that follow may contain sensitive, privileged or confidential information intended solely for the addressee named below. If you receive this message and are not the agent or employee of the addressee, this facsimile communication has been sent in error. Please do not disseminate or copy any of the attached and notify the sender immediately by telephone. Please also return the attached sheet(s) to the sender by mail.

Date:	March 15, 2011	From:	David W. Dachelet, Esq.
To:	Michael J. Oakes, Esq.	Fax No.:	(702) 692-8099
Firm:	Foley & Oakes, P.C.	Bus. No.:	(702) 692-8033
Fax No.:	(702) 384-2128	Pages (including cover):	<u>2</u>
Bus. No.:	(702) 384-2070		

Please telephone (702) 692-8033 if all pages are not received.

**Re: KeyBank National Association vs. Frank Nielsen, et al.
USDC, Case No. 2:09-cv-00352-PMP-LRL
Our File No. 15580.049**

Comments:

Please see attached.

Law Offices:

Phoenix
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012

Tucson
One South Church Avenue
Suite 1000
Tucson, AZ 85701

Nogales
420 West Mariposa Road
Suite 200
Nogales, AZ 85621

Las Vegas
Suite 1400 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

Denver
1700 Lincoln Street
Suite 2900
Denver, Colorado 80203

Exhibit “3”

Exhibit “3”

Logout My Account Search Menu New Family Record Search Refine Search Back

Location : Family Help

REGISTER OF ACTIONS

CASE NO. P-11-070921-E

In the Matter of Frank Nielsen, Deceased

\$
\$
\$
\$
\$

Case Type: Probate - General Administration
 Date Filed: 03/23/2011
 Location: Department H
 Conversion Case Number: P070921

PARTY INFORMATION

Decedent Nielsen, Frank

Lead Attorneys
 Alise S. Denton, ESQ

DOD: 11/22/2010

Retained

7023841723(W)

Petitioner Nielsen, Kamela**Alice A. Denton***Retained*

7024717432(W)

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

03/23/2011	Petition <i>for Admission of Will to Probate for Appointment of Executrix and for Issuance</i>
03/28/2011	Notice of Hearing <i>Notice of Hearing for Adminission of Will to Probate, for Appointment of Executrix and For Letters Testamentary</i>
03/30/2011	Certificate of Mailing <i>Certificate of Mailing</i>
04/06/2011	Certificate of Mailing <i>Additional Certificate of Mailing</i>
04/06/2011	Amended Petition <i>Amendment to Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration</i>
04/06/2011	Amended Petition <i>Amendment to Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration</i>
04/13/2011	Affidavit of Publication <i>Affidavit of Publication</i>
04/15/2011	Hearing (9:30 AM) (Judicial Officer Yamashita, Wesley) 04/15/2011, 04/22/2011 <i>Petition for Admission of Will to Probate, for Appointment of Executrix and for Issuance of Letters Testamentary and for General Administration</i> Result: Matter Continued

FINANCIAL INFORMATION

Petitioner Nielsen, Kamela	
Total Financial Assessment	539.00
Total Payments and Credits	539.00
Balance Due as of 04/25/2011	0.00
03/25/2011 Transaction Assessment	539.00
03/25/2011 Payment (Window) Receipt # 2011-12159-FAM	(539.00)
Denton, Alice A.	